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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1985

CATHERINE AND FRANK HELMINSKI,
as Next Friends of Minor
HUGH HELMINSKI,

Petitioners,

-vs-

AYERST LABORATORIES,
a Division of American Home
Products Corp., a Delaware
corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF QUESTIONS INVOLVED

I. WHETHER HUGH HELMINSKI MAY BE DENIED HIS RIGHT TO ATTEND TRIAL PROCEEDINGS IN WHICH HE HAS AN INTEREST, AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND SEVENTH AMENDMENT RIGHT TO A JURY TRIAL, SOLELY BECAUSE OF A MENTAL HANDICAP.

II. WHETHER THE STANDARD SET FORTH BY THE SIXTH CIRCUIT, WHICH AFFORDS PHYSICALLY HANDICAPPED LITIGANTS THEIR ABSOLUTE CONSTITUTIONAL RIGHT TO ATTEND TRIAL PROCEEDINGS, BUT DENIES THAT RIGHT TO SIMILARLY SITUATED MENTALLY HANDICAPPED LITIGANTS, DEPRIVED HUGH HELMINSKI OF THE EQUAL PROTECTION OF THE LAW.

III. WHETHER THE SIXTH CIRCUIT ERRED IN TREATING THE TRIAL COURT'S WRONGFUL EXCLUSION OF HUGH HELMINSKI AS "HARMLESS ERROR."

PARTIES TO THE PROCEEDINGS

CATHERINE & FRANK HELMINSKI, as Next Friends of Minor HUGH HELMINSKI,

Petitioners,

--AGAINST--

AYERST LABORATORIES, a Division of American Home Products, Corp., a Delaware corporation,

Respondent.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
PARTIES.....	ii
TABLE OF CONTENTS.....	iii
INDEX OF AUTHORITIES.....	iv
OPINIONS.....	v
JURISDICTION.....	v
CONSTITUTIONAL PROVISIONS..	v
STATEMENT OF THE CASE.....	1
EXISTENCE OF JURISDICTION..	11
WHY CERTIORARI SHOULD BE GRANTED.....	11
A. The United States Supreme Court As Well Various State And Federal Courts Have Held That The Right Of An Injured Party To Attend Trial Proceedings In Which He Has An Interest Is Guaranteed By The Due Process Clause Of The Fifth Amendment And The Seventh Amendment Right To A Jury Trial.....	13

(1) The right to a jury trial is a fundamental aspect of American jurisprudence that has always been jealously guarded by our courts..... 13

(2) The United States Supreme Court and various other State and Federal Courts have held that a litigant's right to attend his own trial is an indispensable component of the Seventh Amendment right to a jury trial and Fifth Amendment right to due process of law..... 15

B. The Right Of An Injured Party To Attend Trial Proceedings Is A Right That Pertains Notwithstanding A Physical Or Mental Injury That May Engender Jury Sympathy Or Render The Party Unable To Comprehend Or Contribute To The Proceedings.... 20

II. THE RULE SET FORTH BY THE SIXTH CIRCUIT DENIES HUGH HELMINSKI AS WELL AS OTHER MENTALLY HANDICAPPED CITIZENS EQUAL PROTECTION OF LAW..... 27

III. THE SIXTH CIRCUIT ERRED IN FAILING TO FASHION A REMEDY FOR THE ACKNOWLEDGED VIOLATION OF HUGH HELMINSKI'S CONSTITUTIONAL RIGHT TO ATTEND TRIAL PROCEEDINGS IN WHICH HE WAS AN INTERESTED PARTY..... 33

CONCLUSION..... 37

INDEX OF AUTHORITIES

	Page No.
Anderson v Sears Roebuck & Co., 377 F. Supp 136.....	21
Bartholomay v St. Thomas Lumber Co., 148 N.W.2d 278.....	23
Beacon Theaters, Inc. v Westover, 359 U.S. 500 (1959).....	14
Bolling v Sharpe, 347 U.S. 497 (1954).....	27
Bryant v Kansas City Ry. Co., 286 Mo. 342, 228 S.W. 472 (1928).....	24
Buckley v Valeo, 424 U.S. 1, 93 (1976).....	28
Carlisle v County of Nasseau, 408 N.Y.S. 2d 114 (1978)..	22,25
Chapman v California, 386 U.S. 18 (1967).....	35
Chicago Great Western Ry. Co. v Beecher, 150 F.2d 394 (8th Cir. 1945) cert. den., 326 U.S. 781 (1946).	25
Fillippon v Albion Slate Co., 250 U.S. 76.....	15
Florence v Moors Concrete Products, 35 Mich. App. 613, 193 ... N.W.2d 72 (1971)	16

Florida Greyhound Lines v Jones, 60 So.2d 396 (Fla. 1952).. 20

Hampton v Mow Sun Wong, 426 U.S. 88..... 28

Hunter v Szumlanski, 124 Mich. App 521, 335 N.W.2d 75 (1983)..... 25

In Re Watson, 91 Cal. App. 3rd 455 (1979)..... 18,19

Leed v Robert Joshua Limited, 272 A.P. 72, 72 N.Y.S. 2d 4 (1947)..... 17

Leonards of Plaintifield v Dybas, 130 NJL 135; 31 A2d 496 (1943)..... 18

McIntosh v McIntosh, 79 Mich. 198, 44 N.W. 592 (1890)..... 16

Memorial Hospital v Maricopa County, 415 U.S. 250 (1974)..... 32

Odum v Corn Prod. Refining Co., 173 Ill. App. 343 (1912). 16,24

Parklane Hosiery Co. v Shore, 439 U.S. 322, 352, 99 S.Ct. 645 14

Parsons v Bedford, 3 Pet. 433 (1830)..... 13

Pascarella v Pittsburgh Railway Co., 389 Pa. 8; 131 A.2d 445 (1957)..... 17

Purvis v Inter-County Telephone & Telegraph Co., 203 So.2d 508 (Fla. App. 1967)..... 21

Raper v Berrier, 248 N.C. 193, 97 S.E.2d 782, 783 (1957).... 25

Shapiro v Thompson, 394 U.S. 618 (1969)..... 31

Simler v Connor, 372 U.S. 221, 227 (1962)..... 14

Tolcott v Hull, 224 So.2d 420 (Dist. Ct. App. 1969)..... 24

Whaley v State, 263 Ala. 191, 82 So.2d 187 (1955)..... 15

Willingham v Willingham, 192 Ga. 405, 15 S.E.2d 514 (1941).. 15

OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Michigan and of the United States Court of Appeals for the Sixth Circuit, as yet unreported, are set forth in the appendix at pp ____ and ____, respectively.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on June 25, 1985. The jurisdiction of this Court is invoked under 28 USC _____.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V:

"No person shall be...deprived of life, liberty, or property, without due process of law;..."

U.S. Const. amend VII:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by

a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

U.S. Const. amend. XIV:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall...deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

PROCEDURAL HISTORY

This drug product liability claim arises out of the minor petitioner's severe and permanent neurological damage, or mental retardation, which is manifest as the condition of autism, which petitioner contends was caused by his in utero exposure to Fluothane, a anesthetic agent manufactured and marketed by respondent Ayerst Laboratories. On August 26, 1983, following a seven day jury trial, a verdict in favor of respondent for no cause of action was returned. On September 25, 1983, petitioner filed his motion for a new trial, which was subsequently denied.

Following an appeal as of right, the United States Court of Appeals for the Sixth Circuit entered its opinion affirming the trial court on June 25, 1985. Petitioner now seeks a writ of certiorari. A brief narration of the facts giving rise to this petition are set forth below.

RELEVANT FACTS

Hugh Helminski's In Utero Exposure To Fluothane

The minor petitioner's parents, Catherine and Frank Helminski, are both certified registered nurse anesthetists. The testimony at trial established that throughout the entire nine months of her pregnancy with the minor petitioner, Catherine Helminski was a full-time

employee of Holy Cross Hospital, where she worked in the operating room, administering anesthesia to patients undergoing various surgical procedures under general anesthetic.

It was undisputed that Catherine Helminski was using Fluothane in over 90% of the 148 surgical procedures in which she administered anesthesia during the nine months that she was pregnant with Hugh. Fluothane, like all general anesthetics, is a neurotoxic substance and a central nervous system depressant.

Frank Helminski, who is the Chief of Anesthesia Service at Cottage Hospital in Detroit, Michigan, testified that during Catherine's pregnancy with Hugh, she was exposed to approximately 300 to 600 parts per million of Fluothane while administering anesthesia to young

patients and further that she was chronically exposed to 10 to 100 parts per million eight hours a day, every day she worked during the course of her pregnancy with Hugh.

The Teratogenic Potential Of Fluothane

In response to requests for admissions made by petitioner, respondent admitted that in 1966 it was aware that certified registered nurse anesthetists were being exposed to Fluothane gases and vapors which were released into the work areas such as operating rooms associated with the administration of Fluothane for anesthetic purposes.

Respondent further admitted that it had knowledge prior to 1966 of the awareness within the medical community that drugs of low molecular weight (such as Fluothane) passed the placental barrier when administered to a pregnant woman and

in fact, respondent admitted that Fluothane crosses the placental barrier when administered to pregnant women. Expert testimony established that once the drug such as Fluothane crosses the placental barrier it has an effect on the fetus.

Expert testimony introduced at the time of trial indicated that a developing fetus is particularly susceptible to toxic insults such as drug exposure. While the process of organogenesis or the development of body organs takes place in the first trimester of pregnancy, the central nervous system develops throughout the course of any given pregnancy and in fact, the central nervous system continues to develop even after birth. Thus, Hugh Helminski was exposed to high levels of this neurotoxic substance during the first nine months of

the development of his central nervous system--levels far in excess of levels proven to be teratogenic in laboratory animals!

Respondent's Negligent Failure To Test And Warn

Respondent's negligence in manufacturing and marketing Fluothane was essentially premised on two crucial points; its admission that it did no studies, neither animal nor clinical human testing prior to 1966 to determine the teratogenic potential of Fluothane as well as its admission that in 1966, it did not warn about the potential of harm to unborn children of pregnant women, including nurse anesthetists, who were exposed to Fluothane. At trial, petitioner presented the expert testimony of Dr. Robert Laird, a pharmacologist and Dr.

Mark Thoman, a medical toxicologist, both of whom testified that in 1966, the year of Hugh Helminski's birth, it was reasonably foreseeable there Fluothane had a potential for harming the human fetus and that given the millions of exposures, it was both possible and feasible to set up both animal and clinical human studies. Evidence as to respondent's negligence was essentially unrebutted.

Causation

On the issue of causation, Petitioner presented expert testimony from Drs. Laird and Thoman that the proximate cause of the minor petitioner's central nervous system damage was his in utero exposure to Fluothane. These opinions, which were based upon the witnesses' years of education, training and experience in their respective

fields, were bolstered by several medical journal articles establishing that, Fluothane was teratogenic in test animals exposed to Fluothane at ten to twelve parts per million during gestation, a level far less than that of Mrs. Helminski's exposure! Respondent of course, offered expert testimony that there was no evidence to suggest a causal relationship between Fluothane and autism.

The Trial Court's Untimely Sua Sponte Order For Bifurcation And Exclusion Of Hugh Helminski From The Courtroom

Following the testimony of Petitioner's final expert witness, Dr. Foster Redding, Petitioner's counsel informed the court that the minor petitioner who had been listed as a witness far in advance of trial, would be appearing in the courtroom and would be

called as Petitioner's final witness before resting. Prior to this, Petitioner's counsel had discussed the possibility of introducing a video tape of the child, but reserved his right to have the child attend the proceedings in person. Respondent's counsel objected to the minor petitioner's presence on the basis that his presence in the courtroom would be highly prejudicial.

Petitioner's counsel clearly stated that he did not plan on having the minor petitioner in the courtroom more than five minutes but that he felt that it was important for the jury to visualize him and in any event, that the minor petitioner's constitutional right to a jury trial entitled him to be a part of the proceedings and to be present in the courtroom.

Rather than simply respond to defense counsel's proposal to exclude the minor plaintiff to the courtroom, Judge DeMascio, acting on his own motion, ordered that the trial be bifurcated into separate issues of liability and damages and further ordered that the minor plaintiff be excluded from the courtroom during the liability trial. Thus, Hugh Helminski was never accorded his right to attend his own trial and his case went to the jury for deliberations without the jury ever having seen him. The only presence of Hugh Helminski during the entire proceedings was a small photograph that the court allowed into evidence in rebuttal of Defendant's expert's statement to the effect that all autistic kids "look exactly alike".

On June 25, 1985, the United States Court of Appeals for the Sixth Circuit entered its opinion affirming the lower court. Despite having found there had been no showing that petitioner's presence in the court room would be prejudicial to respondent and that the petitioner was "excluded improperly from the courtroom", the Court determined that reversal was not required.

EXISTENCE OF JURISDICTION BELOW

Jurisdiction in the United States District Court was based on diversity of citizenship as well as the amount in controversy and was not contested by either party. 28 USC 1332(a)(c).

WHY CERTIORARI SHOULD BE GRANTED

I. THE OPINION OF THE SIXTH CIRCUIT CONFLICTS WITH WELL ESTABLISHED STATE AND FEDERAL PRECEDENTS WHICH UPHOLD THE RIGHT OF AN INJURED PARTY TO ATTEND PROCEEDINGS IN WHICH THEY HAVE AN INTEREST NOTWITHSTANDING A PHYSICAL OR MENTAL HANDICAP.

Sup. Ct. R. 17.1 lists various criteria that are considered upon review of an Application for Writ of Certiorari. The rule provides that a writ of certiorari may issue where:

> "(a) ...a federal court of appeals has rendered a decision in conflict with the decision of ancther federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * *
>
> (c) When. . .a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of thie Court.

In the case at bar, the petitioner respectfully suggests that special and important reasons exist for granting the instant Petition for Writ of Certiorari, inasmuch as the Sixth Circuit's opinion, for

the reasons discussed below, runs afoul of well established precedents of the United States Supreme Court, various circuit courts of appeal and various state supreme courts.

A. The United States Supreme Court As Well As Various State And Federal Courts Have Held That The Right Of An Injured Party To Attend Trial Proceedings In Which He Has An Interest Is Guaranteed By The Due Process Clause Of The Fifth Amendment And The Seventh Amendment Right To A Jury Trial.

(1) The right to a jury trial is a fundamental aspect of American jurisprudence that has always been jealously guarded by our courts.

Before addressing the specific merits of this claim, it is important to briefly consider the historical background of the right to a jury trial. Speaking for the United States Supreme Court in Parsons v, Bedford, 3 Pet. 433 (1830), Mr. Justice Story stated:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest in solicitude and every encroachment upon it has been watched with great jealousy."

The widespread support that the Seventh Amendment enjoyed in early America has not declined over the years, and the "general policy favoring jury trials is of...continuing strength." Simler v. Connor, 372 U.S. 221, 227 (1962), Accord: Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959). In Parklane Hosiery Co. v. Shore, 439 U.S. 322, 352, 99 S.Ct. 645, 58 L.Ed. 2d 552 (1979), Justice Renquist stated:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the seventh amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

With these general precepts in mind, plaintiff now addresses the seventh amendment implications of the trial court's ruling regarding excluding the minor petitioner from the courtroom.

(2) The United States Supreme Court and various other States and Federal Courts have held that a litigant's right to attend his own trial is an indispensable component of the Seventh Amendment right to a jury trial and Fifth Amendment right to due process of law.

A party, to a civil action who is not in default, has the right[1] to be present in the court at all stages of trial. Fillippon v. Albion Slate Co., 250 U.S. 76, 39 S.Ct. 435, 63 L.Ed. 853 (1919); Whaley v. State, 263 Ala. 191, 82 So.2d 187 (1955), Willingham v. Willingham, 192 Ga. 405, 15 S.E.2d 514 (1941). In Fillippon, supra., the Supreme Court stated:

> "We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties to attend for purposes to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering a verdict." Id. at 81.

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[1]This right, moreover, is supported by the Michigan Constitution which provides that: "The right of trial by jury shall remain,..." MICH. CONST. OF 1963, ART. 1, §12.

Michigan, like the vast majority of other jurisdictions across the country, adheres to a rigid rule that parties have an absolute right to be present at all stages of the proceedings, regardless of whether criminal or civil in nature. In Florence v. Moors Concrete Products, 35 Mich. App. 613, 193 N.W.2d 72 (1971), the court relied upon the Michigan Supreme Court's holding in McIntosh v. McIntosh, 79 Mich. 198, 44 N.W. 592 (1890), in support of its ruling that a party cannot be excluded from the court room during proceedings in open court and that exclusion of the party is prejudicial per se. Id. at 621. The Florence court, like many courts throughout the land, recognized that there simply is no authority which would allow a judge to exclude a party from the courtroom during the course of trial, for whatever reason. See Odum v. Corn Products Refining Co., 173 Ill. App. 348

(1912). (Decedent's widow and minor children may not be excluded from the courtroom in an action for death even though their presence may elicit the sympathy of the jury in their behalf). Pascarella v. Pittsburgh Railway Co., 389 Pa. 8; 131 A.2d 445 (1957) (there is no rule which authorizes trial judge to exclude plaintiffs from the courtroom while their doctor is testifying), Leed v. Robert Joshua Limited, 272 A.P. 72, 72 N.Y.S. 2d 4, (1947) (while trial court is vested with discretion as to whether to sequester witnesses, it has no authority to exclude a party who has a right to be present at all times).

Thus, it is clear that the Seventh Amendment guarantees the right of a party to be present at all stages of the proceedings. In addition to constitutional denial of petitioner's Seventh Amendment right to a jury trial, petitioner respectfully suggests

that his exclusion by the trial court resulted in a denial of his right to due process of law. In Leonards of Plainfield v. Dybas, supra., the Supreme Court of New Jersey held that:

> "The right of the parties to the cause to be present in person and by counsel at all stages of the trial except the deliberations of the jury is basic to due process. Cook v. Green, supra; Fillippon v. Albion Slate Co., 250 U.S. 76, 39 S. Ct. 435, 63 L.Ed. 853; Wheeler v. Sweet, 137 N.Y. 435, 33 N.E. 483." Accord, Carlisle v. County of Nassau, supra.

More recently, in the case of In re Watson, 154 Cal. Rptr. 151, 91 Cal. App. 3rd 455 (1979), the court relied upon the 14th Amendment to the United States Constitution in support of its holding that a developmentally disabled litigant was deprived due process by virtue of the trial court's denial of her fundamental constitutional right to attend her own commitment hearing. In so holding, the court stated:

> "In the absence of an affirmative showing that a patient is physically unable to attend or has waived personal attendance, due process requires the physical presence of the alleged mentally retarded person at the commitment hearing..." Watson, supra at 462.

This rationale is equally applicable to the case at bar inasmuch as the minor plaintiff's vested[2] fundamental constitutional right of due process guarantees his right to attend court proceedings in which he has an interest.

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[2]Whatever "due process" means in any given context, surely it must mean that a litigant may be present before the tribunal which will pass judgment on his or her case. This right of due process must surely guarantee that before a citizen may be deprived of a fundamental right so cherished and dear as the right to trial by jury, the person or tribunal seeking to take away that right must demonstrate some overriding countervailing interest. There was no such demonstration here and as is discussed below, therefore, the Sixth Circuit's rationale is difficult to understand inasmuch as exclusion was not based upon the potential for prejudice, but rather upon injurious discrimination against the mentally handicapped.

B. The Right Of An Injured Party To Attend Trial Proceedings Is A Right That Pertains Notwithstanding A Physical Or Mental Injury That May Engender Jury Sympathy Or Render The Party Unable To Comprehend Or Contribute To The Proceedings.

The clear line of authority supporting an injured plaintiff's right to be present at trial notwithstanding the potential for sympathy is perhaps best reflected in Florida Greyhound Lines v. Jones, 60 So.2d 396 (Fla. 1952). In that case, the defendant challenged the propriety of the trial courts permitting the appearance of the injured plaintiff before the jury "on a stretcher and, apparently, in a weak, sickened and stupefied condition and attended by a nurse and hospital attendant." Id. at 397. The Florida Supreme Court affirmed the trial court's decision reasoning that: "It would be strange...to promulgate a rule that a plaintiff's right to appear at his own trial would depend on

his personal attractiveness, or that he could be excluded from the court if he happened to be unsightly from injuries which he was trying to prove defendant negligently caused."

More recently, a Florida intermediate appellate court followed Greyhound in Purvis v. Inter-County Telephone & Telegraph Co., 203 So.2d 508 (Fla. App. 1967). In that case, the court held that it was improper to exclude plaintiff from the liability portion of the trial, even though he was "argumentative, somewhat irrational and of such mental attitude and physical appearance that the jury might be influenced." Purvis, supra. at 511. Similarly, in Anderson v. Sears Roebuck & Co., 377 F. Supp. 136 (E.D. La. 1974), the district court rejected defendant's claim that a child who was hideously scarred by severe burns resulting from a fire ignited by a defective heater should be precluded from trial.

In what has come to be considered a landmark decision on the issue of an injured party's rights to attend trial, Carlisle v. County of Nasseau, 408 N.Y.S. 2d 114 (1978), the plaintiff sought damages for injuries sustained in a shooting incident. Because the plaintiff was a permanent paraplegic and was confined to a wheelchair, the trial court refused to permit plaintiff to be present during the jury selection process on the ground that his presence might be inflammatory and/or prejudicial. The appellate court reversed and stated that:

> "The fundamental constitutional right of a person to have a jury trial in certain civil cases includes therein the ancillary right to be present at all stages of such a trial except deliberations of the jury. (Leonards of Plainfield v. Dybas; Odum v. Corn Prod. Refining Co., [parties interested cannot be excluded]; Ziegler v. Funkhouser, 42 Ind. App. 428, 85 N.E. 984 (1908) [every litigant has a right to be present in person and be heard by counsel on the trial of his case]. Such right is basic to due process of law..."

Thus, Hugh Helminski should have been afforded his constitutional right to attend the trial, notwithstanding the fact that his presence may have possibly had a tendency to enlist the sympathy of the jury.

While respondent can be expected to argue that due to his mental impairment, Hugh Helminski could not testify or contribute to the proceedings, various courts, both federal and state, have recognized the right of a litigant to attend his trial, notwithstanding his or her inability to testify or "contribute to the proceedings." In Bartholomay v. St. Thomas Lumber Co., 148 N.W.2d 278 (N.D. 1967), the Supreme Court of North Dakota held that children could not be excluded from the courtroom even though they were too young to testify or even understand the nature of the proceedings inasmuch as they were actual parties to the suit and were, therefore,

vitally interested in the outcome. Similarly, in Bryant v. Kansas City Ry. Co., 286 Mo. 342, 228 S.W. 472 (1921), the Missouri Supreme Court held that a four-year old plaintiff had a right to remain in the courtroom during the trial of his case even though he was too young to testify. See also Odum v. Corn Prod. Refining Co., supra. (decedent's children could not be excluded from the courtroom even though they were too young to testify). A review of these cases reveals that the law recognizes that a party's interest in the outcome of the litigation itself, forms a basis for their right to be present. Odum v Corn Prod Refining Co., supra.

It has also been held that the presence of a party is relevant and valuable as demonstrative evidence. Tolcott v. Hull, 224 So.2d 420 (Dist. Ct. App. 1969). Further, it has been noted that the presence

of a party in the courtroom serves the interest of justice because of the moral effect which the presence may have on the other parties and witnesses. Anderson v. Snyder, 91 Conn. 404, 99 A. 1032 (1971) See also, Hunter v. Szumlanski, 124 Mich. App. 521, 335 N.W.2d 75 (1983); Carlisle v. County of Nassau, supra. at 118; Raper v. Berrier, 248 N.C. 193, 97 S.E.2d 782, 783 (1957).

The Eight Circuit has also upheld the right of an injured child to be present in the courtroom during a trial in which he was an interested party notwithstanding the fact that the child was too young to comprehend the proceedings. Chicago Great Western Ry Co. v. Beecher, 150 F.2d 394 (8th Cir. 1945). cert. denied, 326 U.S. 781 (1946).

Finally, it should be noted that it is well established that a litigant's right to attend trial proceedings is not fulfilled or

protected by allowing his representative in the courtroom. See Helminski, supra, Slip. Op. at p. 8.[3]

Thus, it is readily apparent that the Sixth Circuit's opinion, which affirmed the wrongful exclusion of Hugh Helminski from the courtroom, conflicts with this Court's decision in Fillippon v Albion Slate Co., supra, and further conflicts with the decisions set forth above from the various state supreme courts and circuit courts of appeal.

In cases such as the case at bar, where an isolated panel of the Court of Appeals has rendered a decision that divests a

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[3]In light of the Sixth Circuit's recognition of this principle, it is difficult to reconcile its seemingly result oriented analysis at p. 18 wherein the court concludes that reversal was not warranted notwithstanding the acknowledged constitutional violation inasmuch as "the Helminski's acted as Hugh's next friends and legal representatives."

citizen of a fundamental right in violation of previously well accepted constitutional precedents, petitioner respectfully suggests that special and important reasons exists as envisioned by Rule 17 to grant review on Writ of Certiorari.

II. THE RULE SET FORTH BY THE SIXTH CIRCUIT DENIES HUGH HELMINSKI AS WELL AS OTHER MENTALLY HANDICAPPED CITIZENS EQUAL PROTECTION OF LAW.

U.S. Const. Amendment XIV provides in relevant part:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall. . . deny to any person within its jurisdiction the equal protection of the laws."

The due process clauses of the Fifth and Fourteenth Amendments have been held to yield norms of equal protection indistinguishable from those of the equal protection clause. Bolling v Sharpe, 347 US

497 (1954) (invalidating racial segregation in public schools of the District of Colombia as violative of the due process clause of the Fifth Amendment). See generally, L. Tribe, American Constitutional Law, 16.1 at 992. As stated by this Court in Hampton v Mow Sun Wong, 426 US 88:

> "The federal sovereign, like the states, must govern impartially. The concept of equal justice under law is served by the Fifth Amendments guarantee of due process as well as by the Equal Protection Clause of the Fourteenth Amendment." Id at 100. Accord Buckley v Valeo, 424 US 1, 93 (1976).

It was clearly the objective of the framers of our constitution to require that persons under like circumstances be given equal protection in the enjoyment of personal rights and the prevention and redress of wrongs. In the case at bar, however, the Sixth Circuit has violated the equal protection clause by denying to an

entire class of mentally handicapped citizens the fundamental right to attend trial proceedings as guaranteed under the Fifth and Seventh Amendments, while at the same time granting that right to an identically situated class of persons, specifically, physically handicapped litigants, regardless of how great their potential for prejudice may be.

In order to fully appreciate the nature and extent of the Sixth Circuit's violation of the equal protection clause, one must carefully examine the opinion below. The Sixth Circuit properly recognized that:

> "Consistent with due process, a plaintiff who can comprehend the proceedings and aid counsel may not be excluded from any portion of the proceedings absent disruptive behavior or a knowing involuntary waiver."

The Court then went on to dictate that where a defendant objects to the presence of a party at trial on the basis of the prejudical impact of the party's appearance,

the trial court make a determination as to whether the party is suffering from a mental handicap that renders them unable to comprehend trial proceedings or aid counsel. The Court then found that:

> "[If] the party can comprehend the proceedings and assist counsel in any meaningful way, the party cannot be involuntary excluded regardless of prejudicial impact; in such a case...exclusion of a party...would constitute a deprivation of due process which could be remedied only by granting a new trial."

The Sixth Circuit, however, runs afoul of the equal protection clause by failing to afford the same protection in the similarly situated class of mentally handicapped citizens whose presence might be prejudicial at trial. In the case at bar, the court's decision represents a gross violation of the equal protection clause inasmuch as there was never any determination made that Hugh's presence at trial would be prejudicial to the defendant's case. Therefore, in light

of the Sixth Circuit's expressed finding that: "he was excluded improperly from the courtroom" Id. at 17. It is difficult to understand how the court refused to declare reversible error.[4]

In cases such as the one at bar where there has been a denial of equal protection with respect to the impermissible interference of the exercise of a fundamental right, strict scrutiny must be applied and the classification must be struck down as unconstitutional, unless shown to be necessary to promote a compelling governmental interest. Shapiro v Thompson, 394 US 618 (1969). In the case at bar, while the respondent may be expected to argue that the federal court had a legitimate interest in providing a fair trial for all litigants, it must be

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[4] See argument 3 infra.

recognized that the Sixth Circuit is willing to allow the presence of a physically handicapped citizen notwithstanding how prejudicial their appearance might be and thus, while denying that right to a mentally handicapped plaintiff. Thus, this improper classification cannot be supported on these grounds. This is particularly true under the facts of the case at bar in which no determination was ever made that Hugh Helminski's presence in the courtroom would be prejudicial. Accord Memorial Hospital v Maricopa County, 415 US 250 (1974).

In summary, the Sixth Circuit has clearly created two classes of litigants indistinguishable from each other except that one is composed of citizens who suffer from mental handicaps and the second of citizens who suffer from physical handicaps. The second class is granted and the first class is denied the fundamental right to

attend trial proceedings. This arbitrary, irrational and capricious deprivation of a fundamental right to the mentally handicapped constitutes a clear violation of the equal protection clause and must not be allowed to stand.

In order to avoid application of this particularly unfair and harsh rule upon other mentally handicapped citizens, it is particularly important that certiorari be granted in this matter so that this Honorable Court have an opportunity to rectify the unconsitutional standards set forth by the Sixth Circuit.

III. THE SIXTH CIRCUIT ERRED IN FAILING TO FASHION A REMEDY FOR THE ACKNOWLEDGED VIOLATION OF HUGH HELMINSKI'S CONSTITUIONAL RIGHT TO ATTEND TRIAL PROCEEDINGS IN WHICH HE WAS AN INTERESTED PARTY.

Inasmuch as the Sixth Circuit recognized that if Hugh were not mentally handicapped, his exclusion "would constitute a deprivation of due process which could be

remedied only by granting a new trial" it follows naturally that if the lower court were wrong in assuming that Hugh's mental handicap was a sufficient basis to deny his otherwise absolute right to attend trial proceedings, that a new trial must be granted.

Even assuming, however, the propriety of the Sixth Circuit's determination that a mentally handicapped citizen such as Hugh who was unable to comprehend the proceedings, may be excluded from the courtroom if, following a hearing, it is determined that his presence would be prejudicial, it is without question that no such hearing was held in this particular matter and therefore: "He was excluded improperly from the courtroom." Slip. Op. id. at 17. In light of the Sixth Circuit's determination that he was, in fact, improperly excluded from the courtroom, it

is difficult to understand its refusal to fashion a remedy for this consitutional violation.

Without specifically using the phrase, it is clear that the Sixth Circuit determinated that the wrongful exclusion of Hugh, in violation of his constitutional rights, constituted "harmless error." It is well established that some constitutional rights are so basic to a fair trial that their infraction could never be treated as harmless error. Chapman v California, 386 US 18 (1967). In cases such as the one at bar it must be recognized that certain types of error can have an effect which is so devastating or inherently indeterminate that as a matter of law, they cannot be found reasonably harmless. Chapman, supra at 52 N. 7 (Harlan, J. dissenting).

Petitioner respectfully suggests that the wrongful exclusion of a party,

particularly in the absence of any hearing regarding the party's potential for prejudice, constitutes such an error and thus, cannot be deemed "harmless." Assuming that the exclusion of an interested party, without the benefit of such a hearing, can ever be "harmless", Petitioner respectfully suggests that under the facts of this case, there has been no demonstration that the exclusion was "harmless beyond a reasonable doubt" and therefore, reversal is mandated. Chapman, supra.

CONCLUSION

For the foregoing reasons, Petitioner respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHERINE and FRANK HELMINSKI,
as Next Friends of of minor,
HUGH HELMINSKI,

Plaintiffs,

vs. No. 82 70042

AYERST LABORATORIES, a
Division of American Home
Products Corporation,
a Delaware corporation,

Defendant.
_____/

MEMORANDUM OPINION

Civ. #82-70042

MEMORANDUM OPINION

This cause is before the court on plaintiff's motion for reconsideration of their motion for a new trial. We initially denied plaintiffs' motion for a new trial for failure to seek concurrence of opposing counsel. The court now considers that motion on the merits.

On August 31, 1983, a judgment of no cause for action was entered. The underlying products liability trial involved an autistic child and his nurse anesthetist mother who, during her pregnancy, was exposed to fluothane, a product manufactured by Ayerst Laboratories. After a careful review of

the trial transcript, we conclude that plaintiffs' motion should be denied. We find that the numerous alleged errors cited by plaintiffs did not unduly prejudice their cause.

Plaintiffs first contend that the court failed to instruct the jury that an admission of fact by a party is binding on that party. We agree with the defendant that an appropriate instruction was given. The court stated that: "[b]ut, of course, notwithstanding the fact that arguments and statements of attorneys may not be evidence, the admission of any fact by an attorney or on behalf of a party is binding upon that party." Tr. at 776. Since Ayerst is a corporation, the instruction indicated

that it could be bound by the statements of its representatives. In addition, both parties, in their closing arguments, either explicitly or implicitly, stated that a party is bound by its factual admission. Tr. at 707, 742. This alleged error is not grounds for a new trial.

Plaintiffs next contend that the court erred in not granting their motion for partial summary judgment on defendant's failure to test and to warn. This contention is without merit. Defendant's witness testified as to the enormous amount of research done on fluothane in Great Britain and the United States. In addition, there was testimony

that the Federal Drug Administration would not allow Ayerst to modify its insert until a study on fluothane was completed. This issue of negligence was properly left to the jury.

The third ground for a new trial is that the trial court either intentionally or unintentionally conveyed to the jurors its sense of distrust of plaintiffs' counsel and witnesses. Plaintiffs' examples of alleged bias do not create a basis for a new trial. Plaintiffs are upset that one of their experts was not allowed to use the blackboard to explain a hydrocarbon. They, however, made no objection during the course of the trial to the court's refusal to permit Dr. Thoman to use the board. In addition,

plaintiffs' other expert was allowed to use the board on several occasions. Defendant's experts were not favored over plaintiffs' experts. Plaintiffs' counsel is also disturbed that his paralegal could not sit at counsel table. The fact is that she is not an attorney and is not "demeaned" by not being able to sit at counsel table. Plaintiffs' next example of bias is that Mr. Alteri was allowed to participate in the presentation of defendant's case even though he did not appear at the final pretrial conference. This is the first time that plaintiffs objected to Mr. Alteri's presence. Moreover, Local Rule 21(c) only requires that one of the trial counsel appear at the pretrial conference.

Plaintiffs' last ground is that, in the presence of the jury, the court characterized plaintiffs' offer of proof as improper. After an examination of the record, it appears that plaintiffs are obliquely referring to the examination of Dr. Benjamin. Mr. Bleakley tried to introduce into evidence the actual articles and scholarly works that Dr. Benjamin had examined prior to his court appearance. It is clear under FED. R. EVID. 803(18), that learned treatises cannot be received as exhibits. The court's determination that Mr. Bleakley's offer of proof was improper was correct. Plaintiffs, therefore, have neither shown that the court was distrustful of them

nor that a sense of distrust of them was conveyed to the jurors.

Plaintiffs next attack the bifurcation of the trial and the related fact that Hugh Helminski was not allowed to testify or appear at the liability stage of the trial. Under FED. R. CIV. P. 42(b), a court may order a separate trial on separate issues when necessary to avoid prejudice or in furtherance of convenience. A common use of this rule is to order separation of the issues of liability and damages. The court, in the present case, carefully considered the various equities and determined that in order to avoid undue prejudice the trial must be bifurcated. Hugh Helminski's

condition was undisputed and the effects of his autism were testified to in detail by his mother and brother. Both of them testified that Hugh was incontinent, and that he sometimes made sounds that were loud and frightening. Tr. 527, 574. Plaintiffs' counsel was going to introduce a videotape of Hugh, but at the last moment decided to have Hugh testify for five minutes. The court at that juncture decided to bifurcate the trial. One of the main reasons that the court determined that bifurcation would be appropriate is that it realized that this was only a one-issue dispute; that the only issue was whether there was a causal connection between a pregnant woman's exposure to fluothane and an autistic

birth. The court recognized that Hugh's condition had already been graphically described. The court determined that if plaintiffs' counsel believed that Hugh's presence was only necessary for the issue of damages, then the trial should be bifurcated, because the only reason for Hugh's attendance at the liability stage was to prejudicially inflame the jury. Tr. at 531-536. The court was not in error in bifurcating the trial at that stage of the proceedings, because until that point it was unaware of all the factors that were relevant to a determination that bifurcation was necessary to avoid prejudice. In addition, the court was not in error in disallowing Hugh's presence in the

courtroom. First, Hugh was being represented by his parents pursuant to FED. R. CIV. P. 17(c). In addition, the only reasons for Hugh's appearance was to inflame or to help the jury "visualize" his condition. Under these circumstances, there is no seventh amendment problem, since Hugh was represented by his parents and there was nothing he could gain by being present at the trial. Plaintiffs' fourth and sixth grounds for a new trial are without merit.

Plaintiffs' last reason for a new trial is the fact that defense counsel was allowed during opening and closing arguments to state that this was the only case of its type in the nation. First,

it is relevant that this was never objected to by plaintiffs' counsel, who did make other objections during the pendency of the trial. In addition, there was testimony by witnesses for both parties that this was the only case asserting a causal connection between fluothane and autism. Moreover, the court instructed the jury that whether there were other cases that had asserted this connection was irrelevant. Tr. at 443. We find that evidence of a claim-free history was relevant, and that there was no undue prejudice in allowing defense counsel to argue that this was the first case where a party had asserted that fluothane had caused autism.

In conclusion, plaintiffs have not shown adequate grounds to justify a new trial. Plaintiffs' motion for a new trial will, therefore, be denied.

IT IS SO ORDERED.

/S/ ROBERT E. DEMASCIO
U.S. DISTRICT JUDGE

DATED: March 28, 1984

APPENDIX B

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 83-1726

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CATHERINE AND FRANK HELMINSKI, as Next Friends of Minor HUGH HELMINSKI, *Plaintiffs-Appellants*, v. AYERST LABORATORIES, a Division of American Home Products Corp., a Delaware Corporation, *Defendant-Appellee.*	ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed June 25, 1985

Before: ENGEL and KEITH, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

CELEBREZZE, Senior Circuit Judge. Plaintiffs-appellants Catherine and Frank Helminski, as Next Friends of their minor son, Hugh, brought this products liability suit against defendant-appellee Ayerst Laboratories. The Helminskis contended that Hugh's *in utero* exposure to Fluothane,[1] a surgical

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[1] Fluothane is the trade or brand name of halothane, a general anesthetic, which is a central nervous system depressant. Ayerst received permission from the Food and Drug Administration to market Fluothane as a surgical anesthetic in 1958.

anesthetic manufactured by Ayerst, resulted in injury to his developing nervous system. Specifically, they alleged that Ayerst Laboratories was negligent in testing and marketing Fluothane without warning of potential injury to a fetus, breached express and implied warranties that the product was safe for use by operating room personnel in the first trimester of pregnancy, committed fraud and deceit in marketing Fluothane, and should be held strictly liable for marketing the product. The essence of Ayerst's defense was that Hugh's condition was not the result of *in utero* exposure to its product. After a six-day trial, the jury returned a verdict of no cause of action. The district court denied the Helminskis' subsequent motion for a new trial. From this ruling, the Helminskis appeal.

Catherine Helminski was a certified registered nurse anesthetist. During the entire term of her pregnancy with Hugh, she was employed full-time administering anesthesia to patients undergoing surgery. Fluothane was used in over 90% of the 148 surgical procedures in which Mrs. Helminski administered anesthesia. Both parties agree that during the course of the pregnancy Mrs. Helminski was exposed to Fluothane, although they disagree as to the extent of such exposure.

Born in September 1966, Hugh began to exhibit signs of developmental retardation at an early age. For example, he had not yet begun to speak as he neared the age of three. Eventually, physicians determined that Hugh was autistic. As a result of this condition, Hugh requires 24-hour a day care; he does not speak, is not toilet trained, and has an extremely low IQ. Hugh's arrested neurological development is permanent and irreversible.

The Helminskis raise three issues on appeal. First, they contend that certain references by the trial judge and defense counsel concerning Fluothane's alleged claim-free history were improper and prejudicial. Second, the Helminskis challenge the district court's decision, which was rendered after they

had presented most of their witnesses, to bifurcate the proceedings into separate trials on liability and damages. Finally, the Helminskis argue that Hugh's exclusion from the courtroom during the liability portion of the proceedings infringed upon his Seventh Amendment right to a jury trial and his Fifth Amendment right to due process of law.

I.

The trial court's introductory remarks to the jury, made during *voir dire*, included the following:

> The defendant contends that this is the first case in which it is claimed that exposure by a pregnant woman to this particular drug in question . . . resulted in the birth of a child suffering injury.

Similarly, in his opening statement, counsel for Ayerst indicated that the case was the first "anyplace" in which a party alleged that a pregnant woman's exposure to Fluothane in the operating room resulted in "birth to an autistic child." The Helminskis' counsel failed to object to either statement. On appeal, the Helminskis assert that such comments were prejudicial and warrant a new trial.

A party may not assert as error the introduction of evidence unless a timely objection is made. Fed. R. Evid. 103(a)(1); *see Kokesh* v. *American Steamship Co.*, 747 F.2d 1092, 1094-95 (6th Cir. 1984). Although a court may review the introduction of evidence in the absence of an objection if it constitutes plain error and affects a party's substantial rights, Fed. R. Evid. 103(d), an important consideration in determining whether appellate review is appropriate is the number of times the allegedly improper evidence was elicited without objection, *see United States* v. *Martin*, 757 F.2d 770, 771 (6th Cir. 1985) (review under plain error rule discretionary).

In this case, counsel for the Helminskis failed to object to the statements of both the trial judge and Ayerst's counsel.

Moreover, on two occasions defense counsel asked expert witnesses if they were aware of any other allegations that Fluothane's use resulted in birth defects; the record discloses that no objections were made. In light of the complete failure of counsel to bring before the trial court his objection on this matter, we do not believe that he perceived the issue as one which affected the substantial rights of his client. *Cf. Wainwright* v. *Witt*, — U.S. —, —, —, 105 S. Ct. 844, 858, 859 n.4 (1985) (Stevens, J., concurring). Nor do we believe, as plaintiffs' counsel asserts on appeal, that his failure to object should be excused because he feared that an objection would emphasize the error before the jury. While under limited circumstances an objection might only exacerbate an error in admission of testimony, *Brown* v. *Walter*, 62 F.2d 798, 799-800 (2d Cir. 1933), counsel is generally not excused from bringing an objection to the court's attention, *see Bryant* v. *Consolidated Rail Corp.*, 672 F.2d 217, 218-19 (1st Cir. 1982). Any other general rule would eviscerate Fed. R. Evid. 103(a)(1). We conclude that, in fact, there was no reason to believe that a timely objection would emphasize Fluothane's alleged claim-free history before the jury. Accordingly, the Helminskis have failed to preserve for review their challenge to the comments related to Fluothane's alleged claim-free history.

II.

Following the testimony of the Helminskis' final expert witness, counsel announced his intention to call Hugh as a witness despite a previous agreement to present Hugh to the jury only in a videotape.[2] Ayerst objected, arguing that

[2] Ayerst's contention that Hugh would have been a surprise witness is without merit. Despite any agreements the parties may have had, the pre-trial order listed Hugh as a witness well in advance of trial. Moreover, the issue is irrelevant since the Helminskis asserted before the district court, as on appeal, that Hugh had the right to be present as a party and not as a witness.

Hugh's condition had already been described graphically and, moreover, that there was no dispute concerning the nature of his problems. Essentially, Ayerst perceived that Hugh's presence in the courtroom would prejudice the jury against its case. The Helminskis noted that Hugh would be present in the courtroom for only approximately five minutes to allow the jury to "visualize" him. Further, the Helminskis' attorney asserted that, as a civil litigant, Hugh had a right to be present in the courtroom. In discussing with the parties the possibility of bifurcating the proceedings at this juncture, the court recognized that the case should have been bifurcated, if at all, at an earlier time. Nevertheless, the court reasoned that bifurcation was necessary to prevent Ayerst from being prejudiced. Once the court ruled that the trial was to proceed solely on the issue of liability, it concluded that Hugh's presence would not be relevant in determining whether *in utero* exposure to Fluothane resulted in damage to his nervous system. Thus, the court ruled that Hugh could not be brought into the courtroom during the liability phase of the proceedings.

Although we recognize that the decision to bifurcate the proceedings and the decision to exclude Hugh from the liability phase are closely related, we believe that each issue warrants separate discussion. Accordingly, we review initially the district court's decision to bifurcate the proceedings.

A trial court may exercise its discretion to order separate trials on the issues of liability and damages in order to reduce the possibility that the jury will be prejudiced. *See, e.g.*, In re *Beverly Hills Fire Litigation*, 695 F.2d 207, 216 (6th Cir. 1982); *Dewald* v. *Minster Press Co.*, 494 F.2d 795, 798 (6th Cir. 1974); *Crummett* v. *Corbin*, 475 F.2d 816, 817 (6th Cir. 1973). Bifurcation of proceedings into separate trials concerning liability and damages is appropriate when "the evidence pertinent to the two issues is wholly unrelated" and the evidence relevant to the damages issue could have a prejudicial impact upon the jury's liability determination. 9 C.

Wright & A. Miller, *Federal Practice & Procedure* § 2390 (1971). In our view, since the issues of liability and damages in this case were not so inseparable as to require one unified trial to resolve them both, *see Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 283 U.S. 494, 499-500 (1931), the district court would not have abused its discretion by bifurcating these proceedings at the outset. However, the Helminskis argue that the district court abused its discretion in separating the issues of liability and damages "at the virtual close of plaintiff's proofs." We disagree.

The late bifurcation of a trial does not constitute reversible error in the absence of a showing of prejudice. *See* In re *Beverly Hills Fire Litigation*, 695 F.2d 207, 216 n.13 (6th Cir. 1982). In this case, the Helminskis have failed to establish that any prejudice occurred due to the lateness of the bifurcation order; in fact, the timing of the order may have been beneficial to their case since much of the testimony presented prior to the bifurcation order was not relevant to liability. For example, one of the Helminskis' expert witnesses testified solely concerning Hugh's condition, focusing on his severe mental retardation. This testimony could only have aided the Helminskis' case by demonstrating the severity of Hugh's condition when such evidence was not relevant to the issue of whether Fluothane caused the injury. Moreover, Hugh's mother and brother both testified concerning his condition. The brother testified that Hugh, who was almost seventeen years old at the time of trial, requires constant care and generally spends his time alone, watching television, rocking in a corner, or playing. Mrs. Helminski described Hugh as being approximately six feet tall and weighing ninety pounds. She testified that Hugh is unable to speak but makes sounds which can be frightening to others. According to Mrs. Helminski, because of these sounds, Hugh's inability to control bodily functions, and the necessity of constant supervision, the Helminskis have been unable to go anywhere as an entire family. In our view, such grim testimony did not

prejudice the Helminskis' case. Accordingly, since the Helminskis have failed to demonstrate any prejudice resulting from the lateness of the bifurcation order, we conclude that the district court did not abuse its discretion in the matter.[3]

III.

The remaining issue concerns the district court's exclusion of Hugh from the courtroom during the liability phase of the proceedings. The Helminskis assert that such exclusion deprived Hugh of his Seventh Amendment right to a jury trial and his Fifth Amendment right to due process of law.

Initially, we note that the minor is the real party in interest in a suit brought by a next friend. *See* Fed. R. Civ. P. 17(c); *Crowder* v. *Gordons Transports, Inc.*, 387 F.2d 413, 419 (8th Cir. 1967); *Kuhlmeier* v. *Hazelwood School District*, 596 F. Supp. 1422, 1425 (E.D. Mo. 1984); 3A J. Moore & J. Lucas, Moore's Federal Practice ¶ 17.26 (1985). In this case, the Helminskis brought suit only as the next friends of their minor son and not on their own behalf. As recognized by the district court, there is no doubt that Hugh is the real party in interest. Therefore, we must determine the extent of a civil litigant's right to be present at the trial of his case when the opposing party alleges that his mere appearance before the jury would be prejudicial. In this regard, we must first determine whether a plaintiff has an *absolute* right to be present in the courtroom.

Neither the Fifth Amendment's due process clause nor the Seventh Amendment's guarantee of a jury trial grants to a civil litigant the absolute right to be present personally dur-

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[3] Sound judicial practice requires that, so far as practicable, the trial court's decision to bifurcate proceedings occur prior to trial. However, without some showing of prejudice we do not believe that reversal is warranted solely because of the lateness of the bifurcation order.

ing the trial of his case.[4] *See Faucher* v. *Lopez*, 411 F.2d 992, 996 (9th Cir. 1969). We believe that the extent of a civil litigant's right to be present at trial is appropriately analyzed under the due process clause of the Fifth Amendment. Consistent with due process the right to be present may be sufficiently protected in the party's absence so long as the litigant is represented by counsel. *Cf. Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 81 (1919) ("We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict."); *Arrington* v. *Robertson*, 114 F.2d 821, 823 (3d Cir. 1940) (due process clause of the Fifth Amendment requires that plaintiff be given right to be present in person or by counsel). Nonetheless, since an attorney is merely the representative or agent of the litigant and not the litigant's "alter ego," *Carlisle* v. *County of Nassau*, 64 App. Div. 2d 15, 19, 408 N.Y.S.2d 114, 117 (1978), a court may not exclude arbitrarily a party who desires to be present merely because he is represented by counsel; such exclusion would violate the due process clause of the Fifth Amendment. *Cf. Fillippon*, 250 U.S. at 81; *see Snyder* v. *Lehigh Valley Railroad Co.*, 245 F.2d 112, 114-15 (3d Cir. 1957) (en banc); *Arrington*, 114 F.2d at 823. Accordingly, we now consider what circumstances might, consistent with due process, justify involuntary exclusion of a party.

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[4] Even apart from obstreperous conduct, *see Illinois* v. *Allen*, 397 U.S. 337, 343 (1970), a criminal defendant does not have an absolute right to be present at all stages of his trial, *see Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975); *United States* v. *Brown*, 571 F.2d 980, 986-87 (6th Cir. 1978). The criminal defendant possesses a Fifth Amendment right to be present in court "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge," i.e., only to the extent that his absence would deprive him of a fair trial. *Snyder* v. *Massachusetts*, 291 U.S. 97, 105-06 (1934) (viewing by jury of crime scene in defendant's absence not denial of due process).

Three types of cases are relevant to the issue at hand. First, we will examine those cases which consider a presumably healthy party's right to be present in court during trial. Second, those opinions which involve possible exclusion of a party due to physical injuries will be reviewed; in these cases, the parties were able, we assume, to comprehend the proceedings and aid counsel. Finally, we will survey the small number of cases involving a fact pattern similar to the one facing this court, that is, the excluded party was unable to comprehend the proceedings or aid counsel.

The first group of cases enunciates the general rule that a party is entitled to be present either in person or by counsel at all phases of the trial. *See Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 81 (1919); *McKnelly* v. *Sperry Corp.*, 642 F.2d 1101, 1108 (8th Cir. 1981); *Arrington* v. *Robertson*, 114 F.2d 821, 823 (3d Cir. 1940); *Florence* v. *Moors Concrete Products, Inc.*, 35 Mich. App. 613, 620-21, 193 N.W.2d 72, 75 (1972). As noted earlier, however, representation by counsel does not justify arbitrary exclusion of a litigant who wishes to be personally present in the courtroom.

In the second set of cases, one party claims that the mere physical presence of the other party before the jury is prejudicial. For example, in *Carlisle* v. *County of Nassau*, 64 App. Div. 2d 15, 408 N.Y.S.2d 114 (1978), the defendant county asserted that the plaintiff who sued when he was rendered a permanent paraplegic from a gunshot wound inflicted by a police officer, should have been excluded from the courtroom during jury selection since his presence was inflammatory. The court rejected this contention, concluding that physical appearance did not justify exclusion of a litigant despite his desire to be present.

> [T]he fundamental constitutional right of a person to have a jury trial in certain civil cases includes therein the ancillary right to be present at all stages of such a trial, except deliberations of the jury. [citations omitted].

> Such right is basic to due process of law. [citation omitted].

Id. at 18, 408 N.Y.S.2d at 116. The court in *Carlisle* noted that a party's presence is important not only so that he may observe the proceedings but also so that he can aid his attorney in devising trial strategy. *Id.* at 19, 408 N.Y.S.2d at 117.

While the court in *Carlisle* was faced with a party whose only disability was physical, a Florida court was confronted with the issue of whether to exclude a party whose appearance and conduct was alleged to have resulted in prejudice. *Purvis* v. *Inter-County Telephone & Telegraph Co.*, 203 So. 2d 508 (Fla. Dist. Ct. App. 1967) (per curiam), *cert. denied*, 210 So.2d 223 (Fla. 1968). The trial court excluded the plaintiff from the courtroom because he was found to be "argumentative, somewhat irrational and of such mental attitude and physical appearance that the jury might be influenced." *Id.* at 510. The Florida court of appeals reversed and remanded for a new trial on the issue of liability at which the plaintiff could be present, concluding that the trial court made only "vague" findings as to the plaintiff's mental condition; the appellate court could not "see how his attitude would influence the jury." *Id.* at 511. The issue thus became whether the plaintiff could be excluded solely on the basis of physical appearance and, therefore, was governed by the Florida Supreme Court's decision in *Florida Greyhound Lines, Inc.* v. *Jones*, 60 So. 2d 396 (Fla. 1952).

> One who institutes an action is entitled to be present when it is tried. That, we think, is a right that should not be tempered by the physical condition of the litigant. It would be strange, indeed, to promulgate a rule that a plaintiff's right to appear at his own trial would depend on his personal attractiveness, or that he could be excluded from the court room if he happened to be unsightly from injuries which he was trying to prove the defendant negligently caused. The appellee [who was brought to court on a stretcher] was properly present.

Id. at 397. Thus, the *Purvis* court concluded that "in absence of a showing that [the plaintiff] was incompetent or so incapacitated that he could not comprehend the trial proceedings, he had a right to be present in the courtroom."[5] *Purvis*, 203 So. 2d at 511.

We agree with the proposition, gleaned from *Carlisle*, *Purvis*, and *Greyhound Lines*, that a plaintiff's physical condition alone does not warrant his exclusion from the courtroom during any portion of the proceedings.[6] *See also Sherwood* v. *City of Sioux Falls*, 10 S.D. 405, 409, 73 N.W. 913, 914 (1898) (permitting plaintiff in personal injury action to be brought into court on a cot in order to testify). We must now consider the third type of case which involves a plaintiff whose mental condition, which is allegedly the result of the defendant's

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[5] We note that in *Purvis* the plaintiff had no guardian to represent him, nor was there a showing that the plaintiff was unable to comprehend the proceedings. A Florida appellate court later reaffirmed the notion that a litigant who can comprehend the legal proceedings may not be excluded from the courtroom. *See Freeman* v. *Rubin*, 318 So. 2d 540, 544 (Fla. Dist. Ct. App. 1975).

Other courts, without significant reasoning or citation of authority, have permitted injured child plaintiffs to be present in the courtroom despite the fact that their young ages made it unlikely that they could comprehend the proceedings. *Chicago Great Western Ry. Co.* v. *Beecher*, 150 F.2d 394 (8th Cir. 1945) (child under three years old struck by defendant's train, remained properly in courtroom over defendant's objection), *cert. denied*, 326 U.S. 781 (1946); *Anderson* v. *Sears, Roebuck & Co.*, 377 F. Supp. 136 (E.D. La. 1974) (child disfigured in fire caused by defendant's defective heater permitted to remain in courtroom over objection of defendant).

[6] Family members generally have a similar right to be present in court. For example, there is no reason to exclude a decedent's small son unless he distracts the jury or destroys courtroom decorum, *see Cavendish* v. *Sunoco Service of Greenfield, Inc.*, 451 F.2d 1360, 1368 (7th Cir. 1971), or to prohibit a decedent's widow from attending trial, *cf. Mueller* v. *Cities Service Oil Co.*, 339 F.2d 303, 307 (7th Cir. 1964), or, finally, to exclude the widow and two minor children of the deceased from the courtroom, *see Odum* v. *Corn Products Refining Co.*, 173 Ill. App. 348, 352 (1912) ("It may be true that the presence of the widow and these children would tend to enlist the sympathy of the jury in their behalf, but the widow and children are interested parties in the result of this suit; whatever judgment is obtained belongs to them and we know of no law that prevents interested persons from being present at the hearing of their case, even though their unfortunate condition was such as to enlist the sympathy of the jury . . . .").

conduct, renders him unable to comprehend the proceedings or aid counsel in furthering his case.[7] Two courts have permitted exclusion of such a plaintiff during the determination of liability.

In *Dickson* v. *Bober*, 269 Minn. 334, 130 N.W.2d 526 (1964), the plaintiff was injured in a collision with the defendant's vehicle. The accident had changed the plaintiff from "a vital, intelligent, healthy youth to one unable to express or sustain himself, helpless and entirely dependent on others, and wholly unable to comprehend trial proceedings." *Id.* at 336, 130 N.W.2d at 529. After observing the plaintiff, the trial court stated:

> His eyes seemed to function on detection of an unusual movement. Hideous and agonizing groans and sounds emanated from plaintiff. In this trial test, arranged so that the court would have some conception of what was involved, the above is a fair description of the depressing spectacle that in all likelihood could have been enacted if plaintiff's request [to present the injured young man to the jury] had been granted.

Id. The court determined that since the plaintiff was unable to testify or comprehend the proceedings, he possessed no absolute right to be personally present as long as his rights were protected by his attorney and the guardian who brought the action on his behalf. *Id.* at 337, 130 N.W.2d at 530. In essence, the court concluded that the preservation of a fair trial atmosphere when liability was being considered required that the plaintiff be excluded.

The Supreme Court of Arizona has followed the reasoning of *Dickson*. In *Morley* v. *Superior Court of Arizona*, 131 Ariz. 85, 638 P.2d 1331 (1981), the court upheld the exclusion of a plaintiff who was comatose, required a tracheostomy to breath. and was fed through a tube inserted in his stomach.

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[7] Of course, if the injury is not due to the defendant's alleged conduct, there is no basis for exclusion.

> A plaintiff unable to at least communicate with counsel will have no right denied by exclusion from the courtroom during the liability phase of the trial. If in addition the plaintiff's physical condition, allegedly caused by the defendant, is so pitiable that the trial court determines the plaintiff's mere presence would prejudice the jury, then failure to exclude the plaintiff during the liability phase would deny the defendant's right to an unbiased jury when the source of the bias is totally irrelevant to the liability issue.

Id. at 88, 638 P.2d at 1334.

Other courts have refused to exclude a plaintiff who alleges that the defendants caused the physical and mental injury. For example, a brain damaged plaintiff who alleged that her physicians' negligence resulted in her condition was permitted to be present in court for a few minutes to demonstrate her condition. *Talcott* v. *Holl*, 224 So. 2d 420 (Fla. Dist. Ct. App.), *cert. denied*, 232 So. 2d 181 (Fla. 1969). Specifically, the court permitted an expert witness to demonstrate the plaintiff's condition by asking "certain questions to show her inability to speak or converse normally, and to request her to attempt certain motions to demonstrate her inability or limitations in such respects." *Id.* at 421-22. Similarly, without comment or citation of authority, the Supreme Court of California determined that a trial court did not abuse its discretion in limiting to ten minutes the appearance of a minor plaintiff who had suffered a disabling stroke, following removal of a brain tumor, which resulted in paralysis. *Whitfield* v. *Roth*, 10 Cal. 3d 874, 896, 519 P.2d 588, 604, 112 Cal. Rptr. 540, 556 (1974).

A recent case involving the issue of a litigant's right to be present in court concerned a claim by the plaintiff that he was severely injured in an auto accident as the result of the defendant's negligence. *Marks* v. *Mobil Oil Corp.*, 562 F. Supp. 759 (E.D. Pa. 1983), *aff'd*, 727 F.2d 1100 (3d Cir.

1984). At the outset, the district court bifurcated the proceedings, trying the issue of liability first. Following a jury verdict in the plaintiff's favor, the defendant sought a judgment notwithstanding the verdict or a new trial, claiming that "the sight of the severely injured [plaintiff] posed an unrealistically high risk of invoking jury bias in his favor." *Id.* at 768. The court rejected this contention.

> A party to a lawsuit has a right to attend the trial absent an overwhelming reason to the contrary. In a civil case, this Court can at this time envision no reason to exclude a party because of his injuries, particularly where, as in this case, the party's behavior at trial was not disruptive.
>
> The Court always retains discretion concerning the administration of courtroom proceedings. In this case, the Court exercised its discretion to permit [the plaintiff] to sit in the Courtroom for a few hours during the seven-day liability phase of the trial and throughout the damages phase. Furthermore, this Court finds that the presence of [the plaintiff] was not prejudicial . . . since . . . the testimony of plaintiff's damages witnesses concerning the extent of [the plaintiff's] injuries painted a grimmer picture of the injuries than the actual sight of [the plaintiff].

Id.

Although the opinions reviewed do not couch their analyses strictly in federal constitutional terms, we hold that any exclusion of a litigant must comport with due process. Consistent with due process, a plaintiff who can comprehend the proceedings and aid counsel may not be excluded from any portion of the proceedings absent disruptive behavior or a knowing and voluntary waiver. Thus, a plaintiff with a solely physical abnormality may not be excluded involuntarily, absent disruptive behavior, even when the abnormality is due allegedly to the defendant's wrongful conduct. However, the circumstances in this case go beyond a solely physical injury; Hugh is unable to comprehend trial proceed-

ings or aid counsel in obtaining a favorable judgment. We must consider whether, consistent with due process, the presence of these additional factors permits exclusion. In this regard, the focus of the inquiry should not be on the plaintiff's physical and mental condition; rather, the critical inquiry concerns the effect of such condition on the jury.

The benchmark of our judiciary rests on the ability of the courts to provide all parties with a fair trial. An essential component of a fair trial is "a jury capable and willing to decide the case solely on the evidence before it." *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, ——, 104 S. Ct. 845, 849 (1984) (quoting *Smith* v. *Phillips*, 455 U.S. 209, 217 (1982)). Thus, we must safeguard the jury's ability to decide the case based upon the evidence presented rather than on emotional factors. Although under some circumstances the mere sight by a jury of a severely injured plaintiff may evoke sympathy, juror sympathy alone is insufficient to establish juror prejudice. Generally, the jury will follow the court's instructions and fulfill its promise to decide the case solely on the facts. On the other hand, there may be occasions when the mere presence of a party would render the jury unable to arrive at an unbiased judgment concerning liability. Should such a case arise and the presence of the party would not aid the fair administration of justice, the trial court can exclude the plaintiff or limit his presence. A party's involuntary exclusion under these circumstances would not constitute a denial of due process. Nevertheless, absent disruptive behavior, involuntary exclusion of a party who is able to comprehend the proceedings and aid counsel would constitute a denial of due process since exclusion of such a party would deny him the right to obtain a fair trial.

Having decided that under limited circumstances a party's involuntary exclusion might be justified, we now go on to consider the procedure for making such a determination. In most cases, the decision to permit the injured party's presence or exclude such party can be made prior to trial. Counsel for

both parties, who ought to be aware of the potential conflict, must bring the issue to the court's attention. In our view, a hearing on potential jury prejudice, in which the court observes the injured party, will best protect a litigant's right to be present as well as the opponent's right to a fair trial. Since we believe that the jury will faithfully perform its task, we conclude that a defendant who asserts that a plaintiff's mere presence will prejudice the jury must bear the burden of persuasion on this issue. To allow involuntary exclusion on any other basis would permit the presumption that an injured person's presence alone will always deter the jury from its factfinding mission. Such a presumption would only institutionalize a reaction based solely upon appearance. This we decline to do.

The issue which the district court must resolve at the hearing is whether the party's presence would "prevent or substantially impair" the jury from performing its duties "in accordance with [its] instructions and [its] oath." *Adams* v. *Texas*, 448 U.S. 38, 45 (1980), *quoted in Wainwright* v. *Witt*, —— U.S. ——, ——, 105 S. Ct. 844, 850 (1985). If the court in its discretion determines that the party's presence would, indeed, be prejudicial, the court may bifurcate the proceedings into separate trials on liability and damages, excluding the litigant from the liability phase. Exclusion of a party from the damages portion of the proceedings is, however, inappropriate. *See Morley* v. *Superior Court of Arizona*, 131 Ariz. 85, 88, 638 P.2d 1331, 1334 (1981) ("A jury should not decide *liability* based on the severity of the plaintiff's injury, but certainly the jury should award *damages* based on the severity of the plaintiff's injuries." (emphasis in the original)); *Dickson* v. *Bober*, 269 Minn. 334, 338 n.3, 130 N.W.2d 526, 530 n.3 (1964).

In short, the defendant who seeks to exclude a handicapped plaintiff must establish at a hearing that the plaintiff's presence would prevent or substantially impair the jury's performance of its factfinding task. The requisite showing of prejudice

cannot be satisfied simply by establishing that a plaintiff has a physical or mental injury; the party seeking exclusion must establish that the party's appearance or conduct is likely to prevent the jury from performing its duty. We reiterate that a party's ability to comprehend the proceedings or assist counsel is not the relevant inquiry at this juncture — the issue is whether the party's presence will unfairly prejudice the proceedings in his favor.

Should the district court determine that the party's mere presence would be prejudicial, the court must next consider whether the party can understand the proceedings and aid counsel. If the trial court concludes that the party can comprehend the proceedings and assist counsel in any meaningful way, the party cannot be involuntarily excluded regardless of prejudicial impact; in such a case, cautionary instructions will protect the interests of the defendant in a fair trial. Exclusion of a party who is able to comprehend the proceedings and aid his attorney would infringe upon the "fundamental standards of fairness which every litigant before a federal court has a right to expect," *Drayton* v. *Jiffee Chemical Corp.*, 591 F.2d 352, 361 (6th Cir. 1978), and hence, would constitute a deprivation of due process which could be remedied only by granting a new trial.

Applying the foregoing to the instant case, we conclude that Hugh was excluded improperly from the courtroom. The decision to exclude Hugh was based upon his described condition alone; the district court never observed Hugh to determine whether his appearance or behavior would result in prejudice. In this regard, even defense counsel acknowledged that Hugh's physical appearance was normal. Although testimony indicated that Hugh was not toilet trained, could not speak, comprehend the proceedings, or assist counsel, and sometimes emitted frightening sounds, this description is insufficient to establish that the jury would be prevented from or substantially impaired in performing its duty. The analysis absent in this case would focus on the likelihood of Hugh

displaying abnormal behavior and the likelihood of this conduct affecting the jury's ability to decide the case on the facts. Since this procedure was not followed, we conclude that Hugh was excluded improperly from the courtroom.[8]

Having determined that Hugh's exclusion was inappropriate inasmuch as it was not based upon the court's observations but merely upon Ayerst's assertion of prejudice and has not been shown to be necessary to protect Ayerst's interest in a fair trial, we must now determine what remedy, if any, is warranted. If there is any indication that the plaintiff's presence could have assisted in the presentation of his case, we believe that his exclusion would require reversal. Under the facts of this case, however, where the Helminskis acted as Hugh's next friends and legal representatives, where all parties agree that Hugh was completely unable to comprehend the proceedings, and where Hugh because of his extremely low IQ could not aid his attorney in any meaningful way, we conclude that Hugh's exclusion does not constitute reversible error. Moreover, Hugh's exclusion in this case is not reversible especially because the jury heard full evidence of his condition and, therefore, any potential danger that the jury would be unable to visualize the very human dispute in this lawsuit was removed.

IV.

For the foregoing reasons, the judgment of the district court is affirmed.

Each party is to bear its own costs on appeal.

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[8] While we are mindful that in some instances counsel may seek to parade a handicapped plaintiff before the jury in a deliberate attempt to elicit sympathy, we do not believe that this is a common occurrence. However, should such improper conduct occur, a trial court has the discretion to preserve courtroom decorum.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-1726

CATHERINE and FRANK HELMINSKI,
as Next Friend of Minor
HUGH HELMINSKI,

Plaintiff-Appellants,

-vs-

AYERST LABORATORIES, a
Division of American Home
Products Corporation, a
Delaware corporation,

Defendant-Appellee.

BEFORE: ENGEL and KEITH, Circuit
Judges; and CELEBREZZE,
Senior Circuit Judge

J U D G M E N T

On APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/S/ John P. Hehman
Clerk

Issued as Mandate: July 17, 1985

COSTS: NONE